UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Society for Testing and Materials, et al. *Appellees*, v. **Public.Resource.Org, Inc.,** *Appellant.*	)	**Case No. 17-7035**
American Educational Research Association, Inc. et al. *Appellees*, v. **Public.Resource.Org, Inc.,** *Appellant.*	)	**Case No. 17-7039**

AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, INC., AMERICAN PSYCHOLOGICAL ASSOCIATION, INC., AND NATIONAL COUNSEL ON MEASUREMENT IN EDUCATION, INC.'S EXPEDITED CONSENT
MOTION TO MODIFY THE ORDER SETTING COMBINED WORD LIMITS FOR APPELLEES, WORD LIMITS FOR REPLY, AND THE SCHEDULE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Appellees in No. 17-7039, American Educational Research Association, Inc., American Psychological Association, Inc., and National Counsel on Measurement in Education, Inc. respectfully request a modification of the briefing order to allow a combined total of 18,000 words for the separate Appellees' response briefs in these two appeals.

The response briefs in these cases, to which the motion pertains, are due on October 25, 2017.

Appellees in 17-7035 agree to the request.

Appellants likewise agree to the request.

All parties also agree and request that if the motion to expand the word limits for Appellees is granted, Appellants should be allowed up to 9000 words for reply, and a change to the schedule to allow them to file the reply on January 10, 2018.

THE PROCEDURAL BACKGROUND OF THE TWO APPEALS

This case, captioned in the district court as American Educational Research Association, Inc., American Psychological Association, Inc., and National Counsel on Measurement in Education, Inc. v. Public.Resource.Org, Inc., United States District Court for the District of Columbia ("D.D.C.") No. 14-cv-0857 (TSC), is a copyright infringement action arising from defendants' posting of a particular work of the plaintiffs-Appellees, the 1999 Standards for Educational and Psychological Testing, on the internet.

The American Society for Testing and Materials and various other plaintiffs also brought an action against Public.Resource.Org, Inc., D.D.C. No. 13-cv-1215 (TSC), alleging copyright and trademark infringement, arising from the internet posting of various works of the organizations in that case.

Summary judgment motions were separately filed, supported and briefed in the two cases. Judge Tanya S. Chutkan consolidated argument for the two cases and issued a 55-page Memorandum Opinion, with orders granting and denying plaintiffs' motions in No. 14-cv-0857, and granting plaintiffs' motions in No. 13-cv-1215.

Appellant Public. Resource.Org filed separate appeals in No. 17-7035 and No. 17-7039. On March 7, this Court consolidated the appeals on its own motion. On August 16, 2017, following submission of the parties' proposed stipulated schedule, this Court entered a briefing and scheduling order that states that the *combined* word limits for Appellees' response briefs in the two cases/appeals is 13,000, rather than the 13,000 words for appellee in each case that would have applied absent that order.

THE REASONS WHY THE COMBINED WORD LIMIT SET IN THE ORIGINAL BRIEFING ORDER SHOULD BE INCREASED

The nature of these cases warrants allowing Appellees in the two cases/appeals a word limit more commensurate with two cases, rather than the 13,000 authorized for single appeal response briefs. While the two Appellee groups have interests in common, those interests do not fully overlap and may sometimes diverge. Moreover, one appeal involves distinct trademark issues, while no trademark issue is presented in the other case.

The factual records in the two cases are distinct, involving different materials posted, with a different genesis, posted by the Appellant on the internet. The two cases were filed separately in the district court, with different counsel, with separate summary judgment briefs. In the district court, different *amici* appeared in the two cases.

The infringement claims and defenses differ between the two cases in ways that could be significant. The nature of the Appellees' enterprises in the two cases, how they distribute their work, the manner in which they make their copyrighted works available, and the nature of the copyrighted materials at issue, are different in ways that could be significant. And Appellant itself treated the copyrighted material at issue in the two cases somewhat differently. The underlying issues gave rise to a lengthy opinion by the district court.

Finally, Appellant's position and opening brief of approximately 13,000 words, has also now been supported by the filing of 5 separate amicus briefs containing approximately 24,000 words in total, for a total of 37,000 words on Appellants' side of the ledger.

Appellees expect to be able to reduce redundancy by joining in some arguments or issues — and their request for enlargement to 18,000 words reflects that expectation. But in order to allow Appellees' in these two cases to submit briefs that reflect their different positions and circumstances, and to properly address the issues and distinctions between the cases and better inform this Court, Appellees request that the briefing order be modified to allow Appellees in Nos. 17-7035 and 17-7039 up to 18,000 words combined for their separate response briefs.

If that change is made, the parties also agree and request that Appellants be granted up to 9000 words for their reply, and that the schedule be modified so that the reply is due on January 10 so that Appellants may respond to the additional text and in light of the winter holidays.

CONCLUSION

WHEREFORE, with the consent of all parties, Appellees in No. 17-7039 ask that the August 16, 2017 briefing order be amended to allow response briefs in the two appeals of no more 18,000 words combined, that Appellant be granted 9000 words for reply and that the reply be due on January 10, 2018.

Dated: October 18, 2017

Respectfully submitted,

/s/ Clifton S. Elgarten

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 835 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

Dated: October 18, 2017

/s/ Clifton S. Elgarten
Clifton S. Elgarten

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I filed the foregoing motion via the Court's ECF system, which will send notice of this filing to Counsel for all of the parties.

Dated: October 18, 2017

/s/ Clifton S. Elgarten
Clifton S. Elgarten

Counsel for Appellees